# The Commonwealth of Massachusetts

## DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

November 19, 2004

D.T.E. 03-47-C

Petition of Commonwealth Electric Company, Cambridge Electric Light Company, and Boston Edison Company, d/b/a NSTAR Electric, and NSTAR Gas Company, for approval of tariffs to provide recovery for costs associated with their obligations to provide employees pension benefits and post-retirement benefits other than pensions.

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ORDER ON MOTIONS FOR RECONSIDERATION AND CLARIFICATION BY THE COMPANIES AND THE ATTORNEY GENERAL

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## I. INTRODUCTION

On October 31, 2003, the Department of Telecommunications and Energy ("Department") issued an Order in Boston Edison Company/Commonwealth Electric Company/Cambridge Electric Light Company/ NSTAR Gas Company, D.T.E. 03-47-A (2003). This Order approved an annual adjustment mechanism to recover costs associated with the pension and post-retirement benefits other than pension ("PBOP") expenses of Boston Edison Company, Commonwealth Electric Company, Cambridge Electric Light Company, and NSTAR Gas Company (collectively, "Companies"). D.T.E. 03-47-A at 45-46.

On November 20, 2003, the Companies filed a motion for reconsideration ("Companies Motion") regarding that portion of the Order that denies the Companies the ability to defer for future recovery the difference between pension and PBOP costs for accounting purposes and the pension and PBOP amounts recovered in rates during the first eight months of 2003 ("Eight Months' Costs"). Also on November 20, 2003, the Attorney General of the Commonwealth of Massachusetts ("Attorney General") filed a motion for clarification or reconsideration ("Attorney General Motion") regarding three issues: (1) whether the amount of pension and PBOP costs included in rates for the Companies should be clarified; (2) whether the additional dollars collected through the new mechanism will be deposited into the Companies' respective pension and PBOP trusts; and (3) whether any additional pension and PBOP costs incurred during the Companies' four-year rate freeze approved in Boston Edison/ComEnergy Acquisition, D.T.E. 99-19 (1999) will be recovered from ratepayers. On December 5, 2003, the Companies filed a reply to the Attorney General

Motion ("Companies Reply") and the Attorney General filed an opposition to the Companies' Motion ("Attorney General Opposition").

## II. SUMMARY OF MOTIONS AND OPPOSITIONS

### A. Companies' Motion For Reconsideration

As grounds for their Motion, the Companies assert that the Department's determination denying recovery of the Eight Months' Costs was due to the Department's mistake or inadvertance (Companies Motion at 2). In particular, the Companies claim that (1) there is no bar to recovery of pension and PBOP costs that would be recovered outside of base rates at the conclusion of the rate freeze period; and (2) the Eight Months' Costs qualify as exogenous costs (id. at 3-11).

The Attorney General claims that the Companies fail to satisfy the Department's standard for reconsideration (Attorney General Opposition at 1). The Attorney General asserts that the Companies fail to show extraordinary circumstances that would require the Department to take a fresh look at the issue of recovery of the Eight Months' Costs (id.). He contends that the Companies simply reargue this issue, which was determined in the Order (id., citing Commonwealth Electric Company, D.P.U. 92-3C-1A at 3-6 (1995)).

### B. Attorney General Motion For Clarification or Reconsideration

As grounds for his request for clarification regarding the amount of pension cost included in rates for the Companies, the Attorney General claims that the Department's Order is silent as to the amount currently being collected in the Companies' base rates for pension cost (Attorney General Motion at 2-3). The Companies reply that clarification is unnecessary

because the record is clear and uncontested as to the amount currently being collected in rates for pension and PBOP costs (Companies Reply at 3-4).

As grounds for his request for clarification that the additional dollars collected through the new mechanism be deposited into the Companies' respective pension and PBOP trusts, the Attorney General states the Department is silent as to how, or for what, the additional monies collected through the annual adjustment mechanism will be used (Attorney General Motion at 3-4). The Companies reply that the Attorney General's request is an attempt to reopen the record (Companies Reply at 7).

Finally, the Attorney General seeks clarification regarding the recovery from ratepayers of any prepaid pension balances during the Companies' rate freeze because the Order is silent as to amounts other than the Eight Months' Costs (Attorney General Motion at 4). The Companies respond that the Order properly addresses only the Eight Months' Costs because those are the only pension and PBOP costs during the rate freeze period for which they seek recovery (Companies Reply at 7-8).

## III. STANDARD OF REVIEW

### A. Reconsideration

The Department's Procedural Rule, 220 C.M.R. § 1.11(10), authorizes a party to file a motion for reconsideration within twenty days of service of a final Department Order. The Department's policy on reconsideration is well-settled. Reconsideration of previously decided issues is granted only when extraordinary circumstances dictate that we take a fresh look at the record for the express purpose of substantively modifying a decision reached after review and

deliberation. North Attleboro Gas Company, D.P.U. 94-130-B at 2 (1995); Boston Edison Company, D.P.U. 90-270-A at 2-3 (1991); Western Massachusetts Electric Company, D.P.U. 558-A at 2 (1987).

A motion for reconsideration should bring to light previously unknown or undisclosed facts that would have a significant impact upon the decision already rendered. It should not attempt to reargue issues considered and decided in the main case. Commonwealth Electric Company, D.P.U. 92-3C-1A at 3-6 (1995); Boston Edison Company, D.P.U. 90-270-A at 3 (1991); Boston Edison Company, D.P.U. 1350-A at 4 (1983). The Department has denied reconsideration when the request rests on an issue or updated information presented for the first time in the motion for reconsideration. Western Massachusetts Electric Company, D.P.U. 85-270-C at 18-20 (1987); but see Western Massachusetts Electric Company, D.P.U. 86-280-A at 16-18 (1987). Alternatively, a motion for reconsideration may be based on the argument that the Department's treatment of an issue was the result of mistake or inadvertence. Massachusetts Electric Company, D.P.U. 90-261-B at 7 (1991); New England Telephone and Telegraph Company, D.P.U. 86-33-J at 2 (1989); Boston Edison Company, D.P.U. 1350-A at 5 (1983).

B. Clarification

Clarification of previously issued Orders may be granted when an Order is silent as to the disposition of a specific issue requiring determination in the Order, or when the Order contains language that is sufficiently ambiguous to leave doubt as to its meaning. Boston Edison Company, D.P.U. 92-1A-B at 4 (1993); Whitinsville Water Company,

D.P.U. 89-67-A at 1-2 (1989). Clarification does not involve reexamining the record for the purpose of substantively modifying a decision. Boston Edison Company, D.P.U. 90-335-A at 3 (1992), citing Fitchburg Gas & Electric Light Company, D.P.U. 18296/18297, at 2 (1976).

## IV. ANALYSIS AND FINDINGS

### A. Companies' Motion Regarding Rate Freeze Pension and PBOP Costs

In D.T.E. 03-47-A at 33, the Department not only found that the Eight Months' Costs are the type of costs that the Companies agreed to absorb during the four-year rate freeze period approved in D.T.E. 99-19, but that the Companies cannot "pick and choose the costs that will be absorbed during a rate freeze period." The Department concluded by directing the Companies to exclude the first eight months of 2003 from the annual adjustment mechanism. Id. By these findings, the Department explicitly denied the Companies' request to recover the Eight Months' Costs.

The Companies assert that reconsideration of the Department's Order is required for two reasons. First, the Companies claim that the Order was the result of mistake or inadvertance because the record is clear that any rate changes resulting from the Companies' proposal will not take effect until four months after the rate freeze ends (Companies Motion at 4). Second, the Companies claim that the Order was the result of mistake or inadvertance because there is not substantial evidence that the Eight Months' Costs, which occurred during the rate freeze period, are the type of costs that the Companies agreed to absorb during the rate

freeze period (id. at 4-8). The Companies argue that the Eight Months' Costs are exogenous costs and thus qualify for rate recovery (id. at 8-11).

The Department explicitly denied recovery of the Eight Months' Costs. The Department was well aware of the implementation date of the annual adjustment mechanism. D.T.E. 03-47-A at 32. The relevant date is not the implementation date of the annual adjustment mechanism but rather the period during which the pension and PBOP costs were incurred. Id. at 32-33. The pension and PBOP costs at issue were incurred during the rate freeze.

Further, the Department considered whether the Eight Months' Costs qualified as exogenous costs and found they did not. Id., citing D.T.E. 99-19, at 22-27; see also Exh. NSTAR-JJJ-3 (stock and financial market events affected the pension funds of companies across the nation). We find the Companies' present claim is an attempt to reargue an issue that was explicitly considered and determined in the Order: namely, whether the Companies should be allowed to recover the Eight Months' Costs. Contrary to the Companies' assertion that this issue was not raised, we note that the Attorney General expressly addressed the issue of exogenous costs in his June 5, 2003 Motion to Dismiss at 6, n.5. The Companies chose not to respond to the argument in their Opposition to the Attorney General's Motion. Further, in his August 19, 2003 Initial Brief at 17-18, the Attorney General argued the petition was a request for exogenous costs recovery from the rate freeze. Again, the Companies chose not to

address this argument in their Reply Brief.[1] Our standard of review is clear; reconsideration is not granted for mere reargument. See, e.g., Commonwealth Electric Company, D.P.U. 92-3C-1A at 3-6 (1995); Boston Edison Company, D.P.U. 90-270-A at 3 (1991); Boston Edison Company, D.P.U. 1350-A at 4 (1983). Therefore, the Companies' request is denied.

B. Attorney General Motion

1. Pension Cost Included in Rates

In D.T.E. 03-47-A at 30-31, 45-46, the Department approved an annual adjustment mechanism that allows the Companies to recover pension and PBOP costs being booked by the Companies but not being recovered currently through base rates. The Attorney General seeks clarification of the pension amount recovered in base rates (Attorney General Motion at 2-3).

The Companies provided the precise level of pension and PBOP costs included in each of the Companies' base rates (Exhs. NSTAR-JJJ-4 (Rev); DTE 1-4 (Rev), cols. B, C, D, E; DTE 1-2 (Rev) at 2-5, lns. 10, 20.[2] These are the amounts that serve as the basis for future reconciliations.

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[1] Even if the Attorney General had not explicitly raised the issue, the Companies were well aware of our precedent in D.T.E. 99-19 regarding recovery of costs during a rate freeze. See, e.g., Fitchburg Gas and Electric Company v. Department of Telecommunications and Energy, 440 Mass. 625, 635-636 (2004) (company knew or should have known of applicable Department precedent).

[2] The pension and PBOP costs included in the base rates of Boston Edison Company, Cambridge Electric Light Company, and Commonwealth Electric Company, and NSTAR Gas Company are $24,031,000, $1,207,000, $7,371,000, and $4,818,000, respectively.

There is no need for clarification because the record is clear as to the amount of pension cost currently included in base rates. Therefore the Attorney General's request for clarification regarding the amount currently included in base rates for pension cost is denied.

2. Pension Trust Fund

In D.T.E. 03-47-A at 45-46, the Department approved an annual adjustment mechanism that allows the Companies to recover additional amounts for pension and PBOP costs that are not being recovered currently through base rates. The Attorney General seeks clarification that all additional funds recovered through the resulting tariffs must be deposited into the pension and PBOP trusts created to provide these benefits to the Companies' employees (Attorney General Motion at 3-4).

First, a portion of the funds collected by the Companies will compensate them for their carrying costs incurred to support the Companies' prepayment and deferrals of pension and PBOP obligations. D.T.E. 03-47-A at 36-45. Second, the funding requirements for the pension and PBOP trusts are governed by the Employee Income Retirement Security Act and Internal Revenue Service rules and regulations. D.T.E. 03-47-A at 16, n.15; 37. Third, if the Companies are collecting more in rates than can be used to fund in the pension trust, their pension collection is greater than contributions to the pension trust.[3] Under this circumstance, the Companies' prepaid pension balance, and the carrying charges thereon, will be reduced.

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[3] Prepaid pension balances are created when contributions exceed cost. When the reverse is true, prepaid balances, upon which carrying charges are based, are reduced. See D.T.E. 03-47-A at 37.

The Attorney General's request for clarification is actually a new request to restrict the use of any additional amounts collected for pension and PBOP costs. As such, it is more appropriately considered as a motion for reconsideration. The Attorney General, however, has not established any extraordinary circumstance that would warrant such reconsideration. Therefore, the Attorney General's request regarding the use of the additional amounts collected for pension and PBOP costs is denied.

3. Rate Freeze Prepaid Pension Balances

As part of the Companies' proposed annual adjustment mechanism, the Companies sought to include all pension and PBOP costs they booked in 2003 but did not collect through rates during 2003. Thus, the Companies sought to recover the Eight Months' Costs. In D.T.E. 03-47-A at 31-33, the Department denied the Companies recovery of the Eight Months' Costs because they were costs incurred during the rate freeze period and designed to be absorbed by the Companies. The Attorney General requests that we clarify that the Companies should not recover any pension and PBOP costs during the four-year rate freeze, not just the Eight Months' Costs (Attorney General Motion at 4).

The only costs during the rate freeze that the Companies sought to recover were the Eight Months' Costs. The Department did not allow recovery of those costs. D.T.E. 03-47-A at 31-33. Because the Companies did not seek recovery of additional costs during the rate freeze and the Department did not explicitly grant recovery of further rate freeze costs, the Order is not ambiguous and clarification is inappropriate. Therefore, the Attorney General's request regarding recovery of rate freeze costs is denied.

## V. EXTENSION OF JUDICIAL APPEAL PERIOD

### A. Introduction

We now address the Attorney General's and the Companies' motion to extend the judicial appeal period. The Attorney General filed his request for extension of the judicial appeal period on November 14, 2003. This was six days before the appeal period ended and prior to filing any motion for clarification or reconsideration. The Companies filed their request on November 20, 2003, the last day of the twenty-day deadline.

### B. Standard of Review

General Law c. 25, § 5, provides in pertinent part that a petition for appeal of a Department order must be filed with the Department no later than 20 days after service of the order "or within such further time as the commission may allow upon request filed prior to the expiration of the twenty days after the date of service of said decision, order or ruling." See also 220 C.M.R. § 1.11(11). The 20-day appeal period indicates a clear intention on the part of the legislature to ensure that the decision to appeal a final order of the Department be made expeditiously. Nunnally, D.P.U. 92-34-A (1993); see also Silvia v. Laurie, 594 F.2d 892, 893 (1st Cir. 1978). The Department's procedural rule, 220 C.M.R. § 1.11(11), states that reasonable extensions shall be granted upon a showing of good cause. The Department has stated that good cause is a relative term and depends on the circumstances of an individual case. Boston Edison Company, D.P.U. 90-335-A at 4 (1992). Whether good cause has been shown "is determined in the context of any underlying statutory or regulatory requirement, and is based on a balancing of the public interest, the interest of the party seeking an exception,

and the interests of any other party." Id. The filing of a motion for extension of the judicial appeal period automatically tolls the appeal period for the movant until the Department has ruled on the motion. Nandy, D.P.U. 94-AD-4-A at 6 n.6 (1994); Nunnally, D.P.U. 92-34-A at 6, n.6 (1993).

C. Analysis and Findings

As the grounds for his request for an extension of the judicial appeal period, the Attorney General simply stated he may be filing motions for clarification and reconsideration.[4] This is not an adequate showing of good cause. The Companies waited until the last day of the judicial appeal to file a request for extension as well as a motion for reconsideration on one issue. This is not expeditious treatment of the matter of concern to the Companies.

We recognize, however, that it would be difficult and burdensome to require the Attorney General and the Companies to file an appeal the same day we issue this Order. Instead, we find it appropriate to allow the Attorney General and the Companies seven days from the date of this Order in which to file a petition for appeal with the Secretary of the Department, should the Attorney General and the Companies so choose.[5]

VI. ORDER

Accordingly, after due notice, hearing and consideration, it is

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[4] Filing a request for extension of time to file an appeal in advance of filing the underlying substantive motion does not address the Legislature's intent that the decision to appeal a final order of the Department be made expeditiously.

[5] An appellant must file its appeal with the Supreme Judicial Court within ten days of filing its petition for appeal of an Order with the Department. G.L. c. 25, § 5.

ORDERED: That the Motion for Reconsideration by Boston Edison Company, Commonwealth Electric Company, Cambridge Electric Light Company, and NSTAR Gas Company be, and hereby is, DENIED;

FURTHER ORDERED: That the Attorney General's Motion for Clarification or Reconsideration be, and hereby is, DENIED;

FURTHER ORDERED: That the Attorney General, Boston Edison Company, Commonwealth Electric Company, Cambridge Electric Light Company, and NSTAR Gas Company shall have seven days following the issuance of this Order in which to file a petition for appeal with the Secretary of the Commission.

By Order of the Department,

_____/s/_____
Paul G. Afonso, Chairman

_____/s/_____
W. Robert Keating, Commissioner

_____/s/_____
Eugene J. Sullivan, Jr., Commissioner

_____/s/_____
Deirdre K. Manning, Commissioner

COMMISSIONER CONNELLY, concurring in part and dissenting in part:

The majority today foregoes an opportunity to correct a due process error in the Order of 31 October 2003 in D.T.E. 03-47-A ("Order"), while leaving intact the substance of our decision. The error has been drawn to our attention by the Companies' Motion for Reconsideration, filed 20 November 2003 ("Motion"). The Motion may be properly denied, because the Department acted reasonably in limiting the initial calibration of the pension reconciliation mechanism to costs incurred in the September to December 2003 period, that is, the period after the Companies' D.T.E. 99-19 rate plan ended. The due process error arises from opining on the question of exogenous cost recovery under D.T.E. 99-19 for expenses in the 1 January to 25 August 2003 period ("Eight Months' Costs"). The question of the eligibility for recovery of these expenses under D.T.E. 99-19 was not properly part of the docket investigation of filed tariffs underlying the Order. For that very reason, what the Order styles its "finding", at 32-33, concerning the nature and hence the recoverability under D.T.E. 99-19 of certain additional pension expenses during the period 1 January to 25 August 2003, is itself *extraneous to issues requiring decision* in establishing a pension reconciliation mechanism and determining what expenses would be eligible for inclusion in the first annual calibration of that recovery mechanism. The "finding" is dicta and nothing more: it purports to adjudicate a matter not at issue in the case, viz., the qualification or not of the Eight Months' Costs as recoverable exogenous costs under the Companies' rate plan approved in D.T.E. 99-19.

One can and one should distinguish between recognizing the Companies' pension expenses for purposes of calibrating the pension reconciliation mechanism established by the Order in D.T.E. 03-47-A and recognizing those same expenses as qualifying, or not, for recovery under the exogenous cost factors set out in the Companies' rate plan, established in D.T.E. 99-19 and upheld in *Attorney General* v. *Department of Telecommunications and Energy*, 438 Mass. 256 (2002). *A reconciliation mechanism, by its very nature, operates separate and apart from base rates* and from other adjustments to base rates: it is a separate charge, outside of ordinary distribution base rates, a charge that, typically, deals with recovery of a cost subject considerable annual fluctuation or volatility. The Department's "broad authority" to establish such mechanisms to avoid unnecessary general rate cases under G.L. c. 164, § 94, has been upheld. *Fitchburg Gas and Electric Light Company* v. *Department of Telecommunications and Energy*, 440 Mass. 625, 637 (2004). By contrast, an exogenous cost factor is a recognized *adjustment to distribution base rates themselves* and is a customary feature of multi-year rate plans or rate freezes, whose purpose is to provide, upon petition and adequate proof, increases (and decreases) to base rates for unexpected changes in certain types of costs above pre-established thresholds. The order approving the Companies' own rate plan in D.T.E. 99-19, at 25, set out the procedure for petitioning for exogenous cost relief: "If, during the term of the Rate Plan, the [Companies] seek to recover any exogenous cost, they must propose exogenous cost adjustments, with supporting documentation and rationale, to the Department for determination as to the appropriateness of recovery of the proposed exogenous cost."

Put simply, that D.T.E. 99-19 mechanism was *not* invoked by the Companies in D.T.E. 03-47. One searches in vain through the Companies' original filing of 16 April 2003 for any invocation of or reference to the D.T.E. 99-19's exogenous cost recovery mechanism. The proposed tariffs filed on 16 April 2003 do not mention D.T.E. 99-19 or exogenous costs; nor does the petitioning cover letter; nor, for that matter, do the pre-filed testimony and accompanying exhibits of the Companies' witness. One looks then to the Department's own Order of Notice in D.T.E. 03-47, published 15 May 2003, for a statement of what was at issue in its investigation: again, only the establishment of a reconciliation mechanism is mentioned, along with reference to the Department's accounting ruling of 20 December 2002 in D.T.E. 02-78 (2002). Again, no reference to the D.T.E. 99-19 exogenous cost recovery mechanism. In addition, following the matter back to its headwaters in the 20 December 2002 accounting ruling yields no trace or suggestion that the issue was ever framed as one of exogenous cost recovery under D.T.E. 99-19. Finally, although today's majority opinion (D.T.E. 03-47-C, at 6) makes much of the Attorney General's passing footnote reference to exogenous costs in his Motion to Dismiss of 5 June 2003, at 6 n.5, one need only look to the Department's ruling on that Motion to Dismiss in D.T.E. 03-47 (7 August 2003), at 10, to see that the Department dismissed the Attorney General's argument about exogenous costs on the grounds that the Companies were not seeking to change rates before the 25 August 2003 end of the rate freeze and ruled, in effect, that the Companies were entitled at least to ask for consideration of the Eight Months' Costs in calibrating the proposed pension reconciliation mechanism, if it should, in the event, be later approved.

It is fair to assume that, had either the Department or the Companies sought to treat the Eight Months' Costs as an exogenous cost question under the D.T.E. 99-19 rate plan, that treatment would have been made explicit when the matter was filed, docketed, or noticed. Even apart from the express provision of D.T.E. 99-19, at 25, the procedure for petitioning for exogenous cost recovery was a well known and long established feature of Department practice, whether as part of a performance based rate regime or a part of a rate plan with rate freeze. A few example will suffice: New England Telephone and Telegraph Company d/b/a Bell Atlantic, D.P.U./D.T.E. 97-67, at 18-21 (1997) (a price cap filing returning payphone subsidies to customers as an exogenous cost adjustment resulting from § 276(a)(1) and (b)(1)(B) of the Telecommunications Act of 1996); Colonial Gas Company, D.T.E. 00-73, at 23 (2001) (grant of exogenous cost recovery for lost base revenues resulting from compliance with demand side management mandates during rate freeze); Massachusetts Electric Company, D.T.E. 03-126/03-124, at 3-4 (2003) (citing the company's D.T.E. 99-47 rate plan for the principle that exogenous costs claims are subject to review and hearing before Department action is ripe). The last cited order, Massachusetts Electric Company, D.T.E. 03-126/03-124, is consistent with earlier treatment of exogenous cost claims; and—what is more—it issued on 29 December 2003, barely a week after the D.T.E. 02-78 accounting ruling issued and less than five months before the Order of Notice in D.T.E. 03-47. So, the approved and expected practice for handling exogenous cost questions can hardly be said to be based on stale or obscure precedent.

Despite all of the foregoing, the Order in D.T.E. 03-47-A mischaracterizes the Companies' request to consider the Eight Months' Costs in calibrating the proposed pension reconciliation as the equivalent of a petition for exogenous cost recovery and, on that basis, proceeds gratuitously to rule that mischaracterization out of court. The Order anticipates and rules upon a question not before the Department. But even so, there is, oddly enough, a latent or tacit recognition of the right way to handle such a question (apart from dicta, that is), when the Order, at 32, characterizes the request to consider the Eight Months' Costs as a means of avoiding "*the only method* permitted by D.T.E. 99-19, i.e., a claim that those additional expenses are exogenous costs [emphasis added]." Again, despite this recognition of correct procedure for handling exogenous cost questions and despite the fact that the Companies had not even raised the question of exogenous cost recovery under D.T.E. 99-19's express procedure, the question of exogenous cost recovery is reached for and unripely ruled upon in dicta: "these additional [1 January to 25 August pension] expenses would not qualify as exogenous costs." Id. We should acknowledge as much, especially as it concedes nothing on the merits of the question of recovery under D.T.E. 99-19, a question which may or may not ever arise in fact.

One can look long and hard but still not find in the Order's cursory treatment, at 31-33, of the Eight Months' Costs for any evidentiary citation in support of the "finding" in dicta (the citation, at 6 *supra*, to Exh. NSTAR-JJJ-3 notwithstanding). Now, it may well be that, given the chance to make a showing of exogenous cost eligibility, the Companies could not do so; but the opportunity to do so was not the subject of their 16 April 2003 petition—nor was the

question adjudicated in our proceeding (despite the claim, at 6 *supra*, in today's majority opinion). Leaving aside the want of record evidence on the question, there was in D.T.E. 03-47-A, nor is there in D.T.E. 03-47-C, any articulation of reasons adequate to support the self-styled "finding". Put differently, there is little or no citation of competent (let alone substantial) evidence to support findings of facts and legal conclusions on an issue not even material to the petition.

Without offering any opinion on whether the Eight Months' Costs would qualify as recoverable exogenous costs under D.T.E. 99-19, it is safe to say that refusal to reconsider and correct the dicta on exogenous cost recovery in D.T.E. 03-47-A, at 32-33, is persistence in what could, on appeal (if appealed), be reversible legal error within the terms of G.L. c. 30A, § 14. It would have been better to have reaffirmed the exclusion of the Eight Months' Costs from the pension reconciliation mechanism and, in parallel, to have recognized the statements debarring exogenous cost recovery for the dicta that they are—i.e., as not germane to the matter before us—and to have corrected them, while at the same time noting that the Companies were not barred from raising the issue of exogenous cost recovery under the terms set out in D.T.E. 99-19. (See Motion at 11 for alternative relief prayed for.) That course would have left the matter of D.T.E. 99-19's relation to the Eight Months' Costs *in statu quo ante* and rectified a clear due process error. Instead, today's majority decision in D.T.E. 0347-C repeats a method of decision-making (want of articulated reasons and record evidence to undergird its conclusion) for which the Department was justly corrected in *Massachusetts Institute of Technology* v. *Department of Public Utilities*, 425 Mass. 856, 871, 873, 875 (1997)

and yet again in *Boston Gas Company* v. *Department of Telecommunications and Energy*, 436 Mass. 233, 242 (2002).

We all err; but persistence in error, especially once pointed out, is something else again. Declining to allow inclusion of the Eight Months' Costs in the first calibration of the pension reconciliation mechanism was reasonable in view of the fact that the indicated, even the prescribed D.T.E. 99-19 procedure for exogenous cost recovery was, at least in principle, still available. Going beyond that and by dicta attempting to foreclose the untried D.T.E. 99-19 petition route was unwarranted. For all of the foregoing, I concur in part in and respectfully dissent in part from today's ruling.

_____/s/_____
James Connelly, Commissioner